The Enigmatic Attitude of the Supreme Court of Japan towards Foreign Precedents — Refusal at the Front Door and Admission at the Back Door — *

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1. Introduction

1.1. The Purpose

This article is to examine the use of foreign precedents by the Supreme Court of Japan in constitutional cases. It is empirically difficult to deny the fact the national courts often receive the influence of foreign case law since some similarities between foreign case law and Japanese case law are observed. However, as the courts (particularly majority opinion of the Supreme Court of Japan) are very unlikely to refer to or cite the foreign case law, it is difficult to examine scientifically how and to what extent they receive the influence in fact. On the other hand, constitutional academics analyse and sometimes criticise the judgments of the Supreme Court of Japan, referring to foreign case law (particularly the case law of the Supreme Court of the United States) on the premise that the Court takes into account foreign case law. However, it is again necessary to examine how and to what extent the Court takes into account foreign case law in order to make the academic analysis and criticism effective and meaningful. In other words, it is the time to examine the question of legitimacy and methodology of the use of foreign precedents.[1] Therefore, this article aims to draw a clear picture of how and to what extent the Supreme Court uses the foreign precedents by using quantitative approach (database searching) and qualitative approach (analysis of each judgment).

The article, combined with the other comparative researches[2], also aims to examine the several constitutional and international legal questions by using the result of

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[1] Reed, R., "Foreign Precedents and Judicial Reasoning: The American Debate and British Practice" (2005) 124 *LQR* 253; Saunders, C., "The Use and Misuse of Comparative Constitutional Law in the Courts" (2006) 13 Indiana Journal of Global Legal Studies 37; Saunders, C., "Comparative Constitutional Law in the Courts; Is there a problem?" (2006) *CLP* 91.

[2] The aforementioned Interest Group consists of 35 scholars who are going to cover 31 countries.

quantitative and qualitative research upon the judgements of the Supreme Court. First, to what extent is it possible to say that there is a trans-judicial dialogue between courts in reality? Secondly, how and to what extent are the common law and civil law traditions converged? Thirdly, if the above questions can be answered in a positive way, does this contribute in admitting the universalism of human rights in reality? Since reference to foreign law and case law in domestic courts are increasing in common law countries and some civilian countries, it is useful to consider the above questions from a new perspective of practice of the courts in referring to or citing foreign precedents in an unselfconscious way or self-conscious (and controversial) way.

1.2. The Extent of Foreign Precedents (Target)

There is no constitutional court in Japan. However, "the Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act" (Article 81 of the Constitution of Japan). Moreover, it is admitted that all the courts have the same power by interpretation of the Constitution.

There is an important difference between the constitutional courts and supreme courts for the purpose of the research. In general it is appropriate to consider cases dealt by the constitutional courts as constitutional cases. On the contrary the cases dealt by the supreme courts are not necessarily constitutional cases. Therefore, in my research it is necessary to select cases which are relevant in the context of the present research. In this article I only deal with cases where the constitutionality of the statute or the governmental act is questioned (constitutional cases). I also clarify the meaning of "foreign precedents". In this article foreign precedents mean foreign precedents concerning constitutional issues such as human rights and constitutional institutional problems. Therefore I do not cover foreign precedents of non-constitutional issues although it is sometimes difficult to draw the line. The use of international case law is not included in the present article although I do not ignore its importance.

1.3. Working Method and Materials

1.3.1. Database

For my research I used two databases. The one is TKC (Database A).[3] The other is the official website of the Japanese judiciary (Database B).[4] Database A contains 15,885 judgements (hanketsu) and decisions (kettei) of the Supreme Court of Japan for the period between 5 November 1947[5] and 31 July 2008.[6] Database B has 8,101 judgments and decisions for the same period. In order to do research as

[3] http://www.tkclex.ne.jp
[4] http://www.courts.go.jp
[5] The Supreme Court of Japan was established in 1947 after the Constitution of Japan was promulgated on 3 November 1946 and took effect on 3 May 1947.
[6] I performed the database search on 31 July 2008.

thoroughly as possible, I mainly used Database A because Database A contains more judgements than Database B does. I used Database B additionally as the website of the Japanese judiciary provides English translations for selected judgements. It has to be noted that neither Database A nor B covers all judgements and decisions given by the Supreme Court of Japan but it can be safely said that they cover the most important constitutional cases.

1.3.2. Time Period

This article covers the period between 1 January 1990 and 31 July 2008.[7] However, the additional research (the below section 4) is not restricted by this time period due to the purpose of the research which I shall explain later.

1.3.3. Working Method (Key Words)

It is difficult to collect cases in which foreign precedents are used without omission because there is no official indication or sign which can show the existence of the use of foreign precedents. Empirically, it is recognised that the Supreme Court of Japan does not use foreign cases for their reasoning. Database A provides the information of case analysis such as appellate history, significant cases cited, legislation cited, journal articles[8] in a searchable way[9] but it does not have a function to search for foreign precedents in Japanese case law. This shows the current situation of weak usage or even non-existence of foreign precedents in a uniformed way.

However, it is also admitted that the judges of the Supreme Court are at least aware of several foreign case laws which are likely to be relevant in terms of similarities of the facts or legal issues of the case since the reasoning of the judgement of the Court sometimes shows resemblance of US case law (see, 4).

In order to deal with the unclear situation, I adopted the following method. First, I searched databases by constitution-related words (such as the Constitution of the United States, constitutional court, etc). The problem I encountered here is how to choose words. In order to have an accurate result, it is preferable to have as many as words possible. On the other hand it is impossible to do a complete research since the probable words are countless.

In order to cope with the problem, I temporarily limit the scope of words on the basis of a hypothesis that countries on which Japanese legal scholars frequently do research as an object of comparative study are more likely to be referred in judgements if any. The reason of the hypothesis is based on the legal history of Japan.[10] Since Japan transplanted the western legal system in the late nineteenth century, the comparative legal study of foreign countries (particularly, Germany, the USA, France and the UK) has been very influential. Therefore, if the Supreme Court (and the counsels) would refer to the foreign cases, it is more likely that the Court

[7] The period between 5 November 1947 and 31 December 1989 will be covered by the next paper, taking into account the discussions of the interest group.

[8] They are mostly case comments which were written after the judgements but not the articles which are referred to in the judgments.

[9] The extent of searchable words of the Database B (official website of the Japanese judiciary) is limited.

[10] See Section 2 for details.

refers to the case law of the above countries. If it does not refer to any of them, it is very unlikely that the Supreme Court of Japan refers to case law of countries which are not mentioned above. Some strong resemblances of reasoning and tests of constitutionality between the Japanese judgement and the USA Supreme Court judgment underpin the assumption.[11]

Additionally, taking into account the popularity of comparative study in Japan, I also add some countries which are often chosen as an object of comparative study because of similarities of the situation or geographical proximity. The country I searched are as follows; Italy, Spain, Belgium, the Netherlands, Sweden, Denmark, Austria, Switzerland, Canada, Australia, New Zealand, Russia, Poland, Hungary, South Korea, People's Republic of China, Republic of China (Taiwan), Thailand, India, South Africa, Brazil, Costa Rica. It is noteworthy that the word "shogaikoku" (foreign countries) is frequently used to represent western democratic countries.

The search words I used can be classified into two groups. The first group is country-oriented. For example, アメリカ憲法 Amerika Kenpou (American Constitution), 合衆国憲法 Gasshuukoku Kenpou (the Constitution of the United States), ドイツ憲法 Doitsu Kenpou (German Constitution), 基本法／ボン憲法 Kihon Ho／Bonn Kenpou (Basic Law for the Federal Republic of Germany), ワイマール憲法 Waimaru Kenpou (Weimar Constitution), フランス憲法 Furansu Kenpou (French Constitution), 第５共和国憲法 Dai5 Kyowakoku Kenpou (the Constitution of the Fifth Republic of France), フランス人権宣言 Furansu Jinken Sengen (Declaration of the Rights of Man and of the Citizen of 26 August 1789), イギリス憲法 Igirisu Kenpou (British Constitution), 権利章典 Kenri Shouten (Bill of Rights), マグナ・カルタ Maguna Karuta (Magna Carta), etc.

The second group is subject-oriented. I chose words which are likely to appear when foreign cases are referred to. For example, 憲法裁判所 Kenpou Saibansho (Constitutional Court), 最高裁判所 Saikou Saibansho (Supreme Court), 控訴裁判所 Kouso Saibansho (Court of Appeal), 地方裁判所 Chihou Saibansho (District Court), 連邦裁判所 Renpou Saibansho (Federal Court), 憲法院 Kenpouin (Conseil Constitutionnel), コンセイユ・デタ Konseiyu Deta (Conseil d'Etat), Haki In (Cour de Cassation), 貴族院 Kizokuin (House of Lords), 控訴院 Kousoin (Court of Appeal), 高等法院 Koutouhouin (High Court of Justice), EC 裁判所／ヨーロッパ司法裁判所 EC saibansho／Yoroppa Shihou Saibansho (European Court of Justice). Although the above words do not cover all the possible words, this search is highly likely to cover the most relevant cases.

1.3.4. Search Method

First, I extracted cases containing the word, "Nihonkoku Kenpou" (the Constitution of Japan/ Japanese Constitution) which I consider as constitutional cases. Database A contains 234 judgments and decisions for constitutional cases for the period between 1 January 1990 and 31 July 2008. Secondly, I searched 234 judgments and decisions by the key words I explained above (see, 1.3.3). Thirdly, I checked each case to see where the key word appears (in majority opinion, dissenting opin-

[11] See Section 4 for details.

ion, or/and concurring opinion). Fourthly, I counted the number of judgements for the quantitative research (see, 3.1). Fifthly, I examined each case to evaluate the influence of foreign law or case law for the qualitative research (see, 3.2). Sixthly and lastly, I examined the "hidden influences" of foreign case law in order to point out the characteristic attitude of the Supreme Court of Japan (see, 4).

2. Background

2.1. History of transplant of foreign legal systems: Two major transplants of western legal system

Two points should be emphasised in order to understand the Japanese history of transplant of foreign legal systems and the significant position of comparative legal study in Japan.

First, even long before the modernisation of Japan which happened at the latter half of the nineteenth century, there had been a well-established tradition to import foreign law as a model: The most influential and long-lasting one was Chinese law from which ancient and medieval Japanese law received strong and direct influence.

Secondly, the co-existence of two different legal families (civil law and common law) in Japanese law is not an intentional or inherent result but rather accidental and unavoidable one. Therefore the situation of transplant of foreign law is not an amalgam but a patchwork. The first fundamental legal reform occurred in the latter half of the nineteenth century when Japan opened itself to the outside world. Modernisation of law in a western way was the most urgent and important priority in order to catch up with western standard and revise the unequal treaties between Japan and western countries since the reason of unequal treaties was based on the claim that there had been no rule of law or democracy in Japan. The Japanese government (Meiji Government[12]) chose the German legal system after an aggressive debate on which country was suitable for Japan to follow as a model. The reason of the choice was the similarities of the situation between Japan and Germany. The latter had tried to catch up with other developed countries by modernising the country. The French model was refused since it was thought too radical for Japan.

The second thorough legal reform took place after World War II under the US occupation in order to make Japan more democratic and liberal. The result was that the strong influence of the US law permeates practical and academic levels.

The major characteristics of the above two turning points were vividly reflected on the drafting process of two Japanese constitutions. The first one, the Constitution of the Empire of Japan (大日本帝国憲法 Dai Nippon Teikoku Kenpou), the first western-model constitution in the history of Japan, was promulgated in 1889 and took into effect in 1890 in order to claim that Japan was a modernised country with a modern constitutional system. It was modelled on the German Constitution

[12] The Edo Government (1603-1867) ruled by the Tokugawa Shogun failed to manage modernisation. It handed over the ruling power to the Meiji Government (1868-1912) ruled by the Meiji Emperor after minor civil wars.

because of the demand for a balance between modernisation and stability (tradition). Therefore, on the one hand, the Constitution was based on the principles of separation of powers and democracy. It included rights of Japanese subjects of the Emperor and an elected House (House of Representatives) as a democratic and constitutional aspect. On the other hand it kept a hereditary Emperor as an absolute monarch who maintained full sovereignty; the Parliament legislated in the name of the Emperor, the Cabinet gave help and advice for the Emperor in order to govern and the courts gave justice in the name of the Emperor. Members of the House of Lords were not elected but nominated because of their hereditary aristocratic status. The House of Lords was expected to restrain the House of Representatives, i.e., the people's power. The rights of subjects were easily curtailed by legislation and even by orders as there was no safeguard against them. After all, the Constitution was prepared for appearance but not for substance (not for the Japanese people). There is a famous anecdote that ordinary citizen did not understand what the constitution (憲法 kenpou) was and misunderstood that they would receive silk cloth (絹布 kenpu) as gift when they heard the news of promulgation of the Constitution.

The present constitution, the Constitution of Japan, was promulgated in 1946 and took into effect in 1947. Its draft was prepared by the occupation army of the United States. The interesting aspect of this constitution is that the draft itself is a hybrid of the constitutions at that time. The Constitution adopts the US style judicial review; the ordinary courts have a power to strike down the statutes. It keeps a bicameral system of the legislature and Cabinet system although the House of Lords was replaced by the House of Councilors (an elected House). Rights of the people (not the subject) were enlarged by adding the equality principle and social rights. Moreover they are entrenched by the foresaid judicial review. It should be emphasised that although the draft itself was prepared by the occupation authorities, it was discussed later at the new democratically elected House of Representatives.[13] Besides the development of the constitutions and bills of rights in the world influenced on a list of rights of the Constitution. Thus, the scope of the rights is wider than the Bill of Rights of the US (the Japanese one has clauses on equality between men and women and social rights[14]). The judicial review based on the United States model is codified into the Constitution. It is also noteworthy that the birth and development of the Constitution of Japan coincides with the development of the international human rights law. Therefore, in theory, it is easier to find more relevancies between the Japanese Constitution and international human rights treaties. However, in practice, the international human rights law has played an extremely limited role in Japanese case law.

2.2. Civil law system or mixed system?

As the historical background shows, in general, Japanese law is based on civil law system. However, because of accumulation of case law and addition of judicial review, the importance of case law has been increased in the long run. Especially

[13] For the first time women over twenty years participated in the election.
[14] Article 25 on social right was added by the proposal of a socialist MP at the deliberation of the draft.

in the field of constitutional law, the case law of constitutional law has become increasingly important because of newly adopted judicial review. Moreover, taking into account the total absence of amendment of the Constitution since when it was enacted, the interpretation of the Constitution by case law is significant.

2.3. The Supreme Court of Japan

The Supreme Court consists of a Chief Judge and 14 judges. The judges excepting the Chief Judge are appointed by the Cabinet (Article 79 of the Constitution). The Emperor appoints the Chief Judge of the Supreme Court as designated by the Cabinet (Article 6). Three major groups from which judges are selected are judges, prosecutors and counsels (barristers). There is no law to specify the allocation but since 1970s it has maintained a situation that six judges are selected from judges, four are selected from counsels and two are selected from prosecutors, based on a custom of filling a vacant post by a person who has the same background of a retiring judge. The Court also recruits judges from a legal professor, an ex-diplomat and an ex-minister in order to obtain a wider and various knowledge and experience. A female judge was appointed in 1994 for the first time and since then the Court has kept one female judge (there has been three female judges in total and they are all ex-ministers at the Ministry of Labour or the Ministry of Health , Labour and Wealth[15]).

The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten years, and in the same manner thereafter. In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed. The judges of the Supreme Court shall be retired at seventy years old. They receive, at regular stated intervals, adequate salary which shall not be decreased during their terms of office (Article 79).

2.4. Majority Opinion, Dissenting Opinion and Concurring Opinion of the Supreme Court

The judgement of the Supreme Court is given by one of three Benches[16] (each Bench consists of four or five judges) or by Grand Bench (15 judges). Any of the Benches can transfer a case to Grand Bench when it finds that the case in question includes a possibility of unconstitutionality or change of the precedent of the Supreme Court. The opinion of the majority is shown as one opinion. The names of the judges who agree with the majority opinion are shown. The judges who disagree with the majority opinion or wish to complement the majority opinion, can write dissenting or concurring opinions. In general the judges are more likely to agree with the majority opinion, without expressing their own view. However, in some controversial cases judges tend to write either dissenting or concurring opinions.

[15] The former was replaced by the latter due to the organisational reform of government.
[16] They are called as the First Bench, Second Bench and Third Bench.

The Judges of the Supreme Court of Japan (11 September 2008)

		Name	Appointed Date	Chamber	Date of Birth	gender	Background	Academic Background
1	Chief Judge	Jirou SHIMADA	16/10/2006 (as a judge; 07/11/2002)		22/11/1938	m	Judge (President of the Osaka High Court)	Faculty of Law, Tokyo University
2	Judge	Tokiyasu FUJITA	30/09/2002	III	06/04/1940	m	Professor of Administrative Law, Touhoku University	Faculty of Law, Tokyo University
3	Judge	Tatsuo KAINAKA	07/10/2002	I	02/01/1940	m	Prosecutor (Director of the Tokyo High Public Prosecutors Office)	Faculty of Law, Chuo University
4	Judge	Tokuji IZUMI	06/11/2002	I	25/01/1941	m	Judge (President of the Tokyo Hight Court)	Faculty of Law, Kyoto University
5	Judge	Osamu TSUNO	26/02/2004	II	20/10/1938	m	Minister	Faculty of Law, Kyoto University
6	Judge	Isao IMAI	27/12/2004	II	26/12/1939	m	Judge (Preseident of the Tokyo Hight Court)	Faculty of Law, Tokyo University
7	Judge	Ryoji NAKAGAWA	17/01/2005	II	23/12/1939	m	Counsel	Faculty of Law and Literature, Kanazawa University
8	Judge	Yukio HORIGOME	17/05/2005	III	16/05/1940	m	Judge (President of the Osaka High Court)	Faculty of Law, Tokyo University
9	Judge	Yuuki FURUTA	02/08/2005	II	08/04/1942	m	Prosecutor (Vice Director of the Supreme Public Prosecutors Office)	Faculty of Law, Tokyo University
10	Judge	Kouhei NASU	25/5/2005	III	11/02/1942	m	Counsel	Faculty of Law, Tokyo University
11	Judge	Norio Wakui	16/10/2006	I	11/02/1942	m	Judge (President of the Osaka High Court)	Faculty of Law, Kyoto University
12	Judge	Mutsuo TAHARA	01/11/2006	III	23/04/1943	m	Counsel	Faculty of Law, Kyoto University
13	Judge	Takaharu KONDOU	23/05/2007	III	23/03/1944	m	Judge (President of Sendai High Court)	Faculty of Law, Tokyo University
14	Judge	Kouji MIYAGAWA	03/09/2008	I	28/02/1942	m	Counsel	Graduate School (law), Nagoya University
15	Judge	Ryuko SAKURAI	11/09/2008	I	16/01/1947	f	Minister	Faculty of Law, Kyushu University

For example, in judgements upon the constitutionality of the electoral system, not few judges expressed the opinion on democracy and role of the parliament (See, 3). Propensity toward the citation of the foreign law or foreign case law by the courts is weak in general.

2.5. Importance of the Law Clerk at the Supreme Court

It is necessary to mention the important role of law clerks at the Supreme Court. They are judges of the lower courts and they are nominated as law clerks, keeping their status as judges.[17] They are relatively young judges who worked as a judge for about fifteen years before the appointment as law clerks.[18] Law clerks read case records and submit reports to the judges in order to help judges screen cases (dismissal, return to the previous court, or acceptance as a Bench case or a Grand Bench case). Taking into account the present workload of the Supreme Court (it receives around seven thousand cases per year) and the number of judges (15 judges), the role of law clerks is important. There is a speculation that law clerks may play more substantial role in deciding whether an appeal should be accepted or not and in writing a draft of judgments than they are legitimately expected to. Law clerks regularly publish the case comments on the judgments of the Supreme Court in legal journals.

[17] Clerks at the lower courts are not judges and recruited by the different qualification examination.
[18] In 2006 there were 34 law clerks.

2.6. The Relationship between the Constitutional Legal Scholarship and the Courts

Constitutional legal scholars have shown strong interests upon the foreign law and case law because of historical background. It is still quite common that when young scholars enter an academic life, they choose one of the western countries as an object of a thorough comparative study (the country becomes a "model country" for them). There are advantages and disadvantages. The great advantage is that even when they examine purely Japanese issues, they consciously or subconsciously look at issues from a perspective of their model country. Therefore, it is likely that their discussion can contain a comparative analysis simultaneously. On the contrary, one of the serious disadvantages is a limit of comparative study performed by a scholar. Since specialisation and ramification in law has gone deeper and further, it is now very difficult to become a specialist of more than one country. The scholars tend to concentrate on one specific foreign country for a comparative study. Therefore their comparison is more likely to become an unilateral comparison rather than a multilateral comparison. When a comprehensive comparative research including many countries is necessary, it has to be performed by a group of scholars. The problem they have to encounter is that it is extremely difficult to agree on definitions and concepts since each scholar has his/her own definition and concept which is based on his/her model country.

The discussion concerning introduction of a constitutional court in Japan is a good example to explain the difficult situation above. Scholars, who support introduction of a constitutional court in Japan as a solution to change the passive Supreme Court, often refer to constitutional courts in Europe, particularly the German Constitutional Court. It is often the case that their model countries are continental European countries that have constitutional courts. On the other hand scholars who study the US Constitution are more sceptical toward a constitutional court.

The concept of human rights is also heavily influenced by model countries. Ironically it can happen that the definition and concept Professor A uses (assume that Professor A's model country is Germany) is difficult to understand for Professor B whose model country is the UK which was historically reluctant to codify human rights into a general abstract document. Therefore the Europeanization of law is a very interesting (and probably helpful) phenomenon for Japanese scholars.

The link between the legal scholarship of constitutional law and the courts has been weak. There are several reasons. Firstly, the Japanese system of nomination and promotion of judges is so bureaucratic that it encourages judges to stay in the circle of judges, but not outside.[19] The judges and prosecutors (they consist of majority at the Supreme Court as 8 out of 15) who enable to reach the Supreme Court are more likely to be traditional and conservative minded.

Secondly, judges are very careful not to show their political viewpoint in order to keep them to be seen as neutral and independent. Constitutional matters are often

[19] Supreme Court (Grand Chamber, hereinafter GB), judgement of 1 December 1998 (Judiciary Disciplinary Action case, see, 3.2.1.1), *Saikou Saibansho Minji Hanreishu* (hereinafter *Minshu*) 52-9-1761.

political and controversial. Therefore, they are the most difficult for them to discuss in public.[20] The Supreme Court has always one academic judge among members. However, when academics work as judges, they are likely to maintain status quo rather than propose a reform which they would have supported as academics.[21]

Thirdly, as the academic comparative study is very country-oriented, it is not so easy to evaluate it from a wider perspective. This is the problem that legal academics need to rethink.

The weak link between constitutional scholars and judges is related to the weak propensity of judges toward the foreign law in general. The constitutional academics have criticised the Supreme Court on two points from a perspective of comparative study. First, it is inappropriate that the Supreme Court does not refer to nor take into account the US case law in a clearer way despite the similarities of the issues and contexts. Secondly, how the Supreme Court uses the US case law (in a hidden way (see, 4)) is misunderstood or even wrong. In my view, foreign case law (particularly, the US case law) sometimes plays a crucial role in deducing legal reasoning and constitutionality tests "from a back door". I shall try to show some examples later (see, 4). I would like to add that the comparative study has been a useful source for the appellants who bring constitutional cases to the courts.

3. Empirical research

3.1. Quantitative Approach

There is no explicit citation of foreign case law or foreign law in the majority opinion of the judgments and decisions of the Supreme Court of Japan.

There are two interesting examples in the majority opinions of the Supreme Court in which the word "Shogaikoku" (foreign countries) is used. The details are explained in 3.2.1.

There are seven cases in which dissenting opinions referred to foreign law or case law and four cases in which concurring (supplementary) opinions referred to foreign law or case law.

3.2. Qualitative Approach

There is no systematic method of citation or reference of foreign law or case law. Therefore, I describe how foreign law or case law is mentioned in each case. I explain 2 cases in which majority opinions used words as "foreign countries", 7 cases in which dissenting opinions mentioned foreign case law, foreign law or legal practice and 4 cases in which concurring (supplementary) opinions mentioned foreign case

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[20] Id.

[21] A professor of Anglo-American and Constitutional Law confessed in his book which he published after he retired from the Supreme Court that his views as an academic and his views as a judge of the Supreme Court were different due to the task and role of the judge of the Supreme Court. His opinion as a judge in several crucial cases disappointed other academics who expected to see more radical judgments as the academic judge was considered as liberal and a strong supporter of freedom of expression. Masami Ito, Saibankan to Gakusha no Aida (Between the Judge and the Academic) (Yuhikaku, 1993).

law, foreign law or legal practice. The total number of cases which refer to foreign law or case law is twelve.

3.2.1. Majority Opinion

3.2.1.1. Judicial Disciplinary Action (1 December 1998)[22]

The case is concerned with the disciplinary action against a judge who participated in a symposium concerning a controversial Communication Interception Bill (at that time).[23] The majority opinion held that legal restrictions and practice in "foreign countries", which adopt a more relaxed attitude towards individual activities of judges can be one of references but it is not possible to apply them directly to Japan.

3.2.1.2. Nationality Law (4 June 2008)[24]

In this case the words "foreign countries" is used on both sides: the majority opinion and dissenting opinion. The case is concerned with the legal status (nationality) of a child who was born out of wedlock between a Philippine mother and a Japanese father who legally admitted that he was the father of the child. The Minister of Justice had refused the application for Japanese nationality. The majority opinion held that the child was entitled to acquire Japanese nationality according to the constitutional interpretation of the Nationality Law, mentioning the existence of law reforms in "foreign countries" abolishing unequal status between a legitimate and an "illegitimate" child.

On the contrary, the dissenting opinion (Judges Yokoo, Tsuno and Furuta) disagreed with the majority opinion on this point. It argued it was not appropriate to take into account the trend in Western countries, particularly European countries since there were more international marriages because of geographical and historical situation and regional integration was intensified by the development of the EU.

3.2.2. Dissenting Opinion

3.2.2.1. "Illegitimate Child" (Inheritance) (5 July 1995)[25]

The case is concerned with the constitutionality of the Japanese Civil Law which prescribes a different treatment between a legitimate child and a child born out of wedlock as to the legal allocation of inheritance for the situation when the deceased person does not leave a testament or there is a disagreement concerning the allocation of inheritance. The law provides that an "illegitimate" child is entitled to inherit a half of the allocation of inheritance to which a legitimate child is entitled.

The majority opinion denied unconstitutionality by admitting a wide discretion to the legislature. However, it was a controversial case as the Tokyo High Court had struck down the legislation as unconstitutional in the same case and the Supreme

[22] Supreme Court (GB), judgment of 1 December 1998, *Minshu* 52-9-161.
[23] The organiser of the symposium dealt with the Bill from a critical viewpoint and the judge in question had sent a letter to a newspaper to raise the question against the Bill.
[24] Supreme Court (GB), judgement of 4 June 2008, *Hanrei Jiho* 2002-13.
[25] Supreme Court (GB), judgement of 5 July 1995, *Minshu* 49-17-89.

Court judgement itself accompanied five dissenting opinions and five concurring (supplementary) opinions.

Interestingly, both of the dissenting opinions and concurring opinions mentioned foreign case law and/or foreign law. Judge Kabe's concurring opinion said that the issue in question was not the propriety of the legislation denying entitlement of an "illegitimate" child as an heir as the American legislation in question does, but the propriety of the allocation of inheritance on the premise that an "illegitimate" child can be one of the heirs. His usage of foreign law and case law can be classified as "an example not to be followed (*a contrario*)" in a broader sense.

Judge Onishi's concurring opinions also mentioned the legal reform in abolishing unequal status of an "illegitimate" child but he denied unconstitutionality of the law by emphasising the necessity of delicate balance between private parties' interests protected by the Civil Law.

On the contrary dissenting opinion of five judges strengthened their reasoning by pointing out that it was a general trend in "foreign countries" that legal distinction between the legitimate and "illegitimate" child became unreasonable and legal reform in order to treat them equally occurred since the 1960s.

3.2.2.2. Election (House of Councilors) (2 September 1998)[26]

The case is concerned with the constitutionality of the disparity of value of vote among constituencies of the Election of the House of Councilors from the viewpoint of equality principle (Art 14 of the Constitution). Due to the rapid urbanisation more and more people moved from rural areas to city. Consequently, substantial value of one vote varies, depending on where electors live. The maximum disparity between an urban constituency and a rural constituency reached 1:4.99.

The majority opinion admitted the constitutionality of the Election Law, admitting a wide discretion to the legislature. However, five dissenting opinions were expressed. The dissenting opinions of Judge Ozaki and Fukuda argued that the acceptable disparity had to be remained from 10% to 20 % (therefore the present disparity was unconstitutional), referring to the situations of the US, the UK, Germany and France and their case law concerning the acceptable disparity. Interestingly the opinion also referred to the academic writings which are rarely referred at the Supreme Court.

3.2.2.3. Election (House of Representatives) (10 November 1999) I[27]

The case is concerned with the constitutionality of the disparity (1:2.309) of value of vote among constituencies of the Election of the House of Representatives. The majority opinion held it constitutional but it was a controversial judgment as five dissenting opinions were added.

The dissenting opinion of Judge Fukuda interestingly stated "it is impossible to adopt an argument that the interpretation of the Constitution of Japan has to be done according to the case law accumulated by the Japanese judiciary and it is

[26] Supreme Court (GB), judgement of 2 September 1998, *Minshu* 52-6-1373.
[27] Supreme Court (GB), judgement of 10 November 1999, *Minshu* 53-8-1441.

not necessary to consider experiences in foreign countries." Then, he expanded the objects for comparison from the USA, the UK, France and Germany which he had referred in the judgement of 2 September 1998 (see, 3.2.2.2) to Italy and Canada which also managed to maintain the disparity less than 25%. Consequently, he claimed that the examples of other countries were extremely helpful to see how lightly the principle of equality of the Japanese Constitution was taken in the election of Parliament and to what extent it was possible to amend the current situation in order to achieve the goal (1:1) as close as possible.

3.2.2.4. Election (House of Representatives) (10 November 1999) II[28]

The case is concerned with constitutionality of the newly reformed electoral system as the majority system.[29] This was also a controversial case as five judges wrote dissenting opinions. Judge Fukuda repeated what he said as the dissenting opinion in 3.2.2.3.

3.2.2.5. Election (House of Councilors) (6 September 2000)[30]

The case is concerned with the constitutionality of the disparity (1:4.99) of vote value among constituencies of the Election of the House of Councilors. The majority held it constitutional, admitting a wide discretion of Parliament but five dissenting opinions were expressed.

The dissenting opinion of Judge Fukuda emphasised the importance of the judicial review as a mechanism to examine whether the legislation made by the legislature based on considerations of policies was constitutionally incompatible or not, mentioning the role of judicial review of other countries. He pointed out the necessity of changes in the precedent.

3.2.2.6. Election (House of Councilors) (14 January 2004)[31]

The case is concerned with the constitutionality of the disparity (1:5.06) of vote value among constituencies of the Election of the House of Councilors. The Majority held it constitutional, admitting a wide discretion of Parliament. However the content of the judgment became more complicated than the judgement of 6 September 2000 (see, 3.2.5) since six judges expressed dissenting opinions and nine judges who agreed with the majority opinion wrote concurring opinions.

The dissenting opinion of Judge Fukuda strongly argued for necessity of a judgement admitting unconstitutionality of the present disparity existing at the constituencies of the House of Councilors. He emphasised that disparity of vote value was taken seriously in the USA, Germany and Italy as he did in previous cases (see, 3.2.2.3, 3.2.2.4. 3.2.2.5), citing judgements of the US Supreme Court as "judgment of 1962" and "judgement of 1983" (he did not give the citation detail). Moreover he

[28] Supreme Court (GB), judgement of 10 November 1999, *Minshu* 53-8-1704.

[29] After the political scandal and upheaval, the political reform took place in 1994. One of the measures for reform was change of the electoral system from medium-sized constituency system to mixed mechanism of majority system (300 seats) and proportional representative system (200 seats, later 180 seats).

[30] Supreme Court (GB), judgement of 6 September 2000, *Minshu* 54-7-1997.

[31] Supreme Court (GB), judgement of 14 January 2004, *Minshu* 58-1-56.

suggested that if the Court continued to avoid declaring the present disparity as unconstitutional, it would trigger an argument for a constitutional court and the Court would lose the power of judicial review since the Court was considered as useless for protecting democratic government whose healthy condition was fundamentally guaranteed by judicial review.

The dissenting opinion of Judge Kajitani also mentioned that the equality principle of vote value was rigorously protected in Western democratic countries. Particularly he pointed out the fact that the US Supreme Court held that "one person one vote" principle had to be applied in the elections and since 1963 the principle has been rigorously applied. It should be noted that Judge Kajitani referred to the dissenting opinion of the judgment of 2 September 1998 (see, 3.2.2.2).

3.2.2.7. Nationality Law (4 June 2008)[32] → see, 3.2.1.2

3.2.3. Concurring (Supplementary) Opinion

3.2.3.1. "Illegitimate Child" (Inheritance) (5 July 1995)[33] → see, 3.2.2.1

3.2.3.2. Separation of Government and Religion (Laïcité) (2 April 1997)[34]

The case is concerned with the constitutionality of the act of a local government which paid the fee for offerings to the Yasukuni shrine, a principal Shinto shrine in Japan. The Constitution of Japan provides the freedom of religion (Art 20) and the separation of government and religion in order to ensure religious liberty (Art 20 and 89). The issue is whether the local government's payment is considered as a religious act which is prohibited under the Constitution or as a social custom which the Japanese people may expect the local government to follow. Historical background of the case is that before and during World War II the Yasukuni shrine played an important spiritual and religious role in maintaining the government policy, which was undemocratic and militaristic, and the government often suppressed freedom of other religions.

It is noteworthy that the Supreme Court previously established a constitutionality test (purpose-effect test) concerning the principle of separation of government and religion in the judgement of 13 July 1977 (See, 4.2.3). It was considered that the Court consulted the Lemon test of the US Supreme Court although the citation was not found in the judgement. In the judgment of 13 July 1977 the Court held that local government did not breach the Constitution as a result of the application of the test. The conclusion and the test itself were severely criticised by the academics. They claimed that the test (or how the test was applied) was so broad and ambiguous that it could not control government activity in order to make sure to guarantee the protection of freedom of religion. On the contrary, in the 1997 judgment, the Court

[32] Supreme Court (GB), judgement of 4 June 2008, *Hanrei Jiho* 2002-13.
[33] Supreme Court (GB), judgement of 5 July 1995, *Minshu* 49-17-89.
[34] Supreme Court (GB), judgement of 2 April 1997, *Minshu* 51-4-1673.

admitted that the local government breached the Constitution. Therefore, it is interesting to see whether the Supreme Court maintained the previous test (but facts are different) or developed the previous precedent into a stricter test.

The concurring but complementary opinions of Judge Takahashi and Ozaki are noteworthy on this point. They criticised the purpose-effect test as too obscure to decide the extent of constitutionally permissible relationship between government and religion. Judge Takahashi supported the absolute separation of government and religion and proposed a new test that it was not permissible for government to be involved with any religion unless the complete separation was impossible or inappropriate.

Judge Ozaki, who shared the same view (absolute separation) with Judge Takahashi, pointed out an interesting comparison. He stated that it was wrong to adopt the purpose-effect test just because of apparent similarities of the Amendment Clause 1 of the Constitution of US and Article 20 of the Constitution of Japan. In his view the American Constitution provides what is prohibited under the Constitution (he cited the words of the American Constitution). Therefore it is necessary to make it clear what is prohibited and establish a test for that purpose. On the contrary the Japanese Constitution prohibits all the religious acts of government. Therefore, it is logical to prescribe narrowly what is permissible as an exception under the Constitution on the premise that all religious acts are prohibited. In his words, government must not involve with an act whose religious nature is suspected unless there is clearly a highly legal interest which would permit an exception to the separation principle. How he used the US Constitution can be classified as "an example not to be followed (a contrario)" in a broader sense.

3.2.3.3. "Illegitimate" Child (Inheritance) (27 January 2000) I[35]

The case is concerned with the constitutionality of the Japanese Civil Law as aforementioned. The concurring opinion of Judge Fujii generally mentioned the trend of legislation in "foreign countries" and ratification of international human rights treaties in the context of analysing the background of influential opinions which were sceptical towards the law. He, however, took the discreet attitude as a judge and gave a wider discretion to the legislature.

3.2.3.4. "Illegitimate" Child (Inheritance) (27 January 2000) II[36]

The issue is the same as 3.2.3.3. Judge Fujii repeated the same concurring opinion.

3.3. Analysis

Despite the fact that appellants often cite or refer to foreign law or case law which reinforces their arguments and submits academic papers as evidence, it is very unlikely that foreign law or case law influences on the judgement of the Supreme Court in an explicit way.

There are, however, some exceptions. First, when the gap between the Japanese

[35] Supreme Court, judgement of 27 January 2000, *Hanrei Jiho* 1260-6.
[36] Supreme Court, judgement of 27 January 2000, *Katei Saibansho Geppo* 52-7-78.

law and foreign laws are very wide, the comparison between them catches the attention of judges who disagree with the majority opinion. The good examples are cases concerning disparity of vote value (see, 3.2.2.2, 3.2.2.3, 3.2.2.5 and 3.2.2.6) among constituencies and cases concerning legal distinction of legitimate child and "illegitimate" child (see, 3.2.2.1 and 3.2.2.7).

In the former example, dissenting opinions of the Supreme Court strongly claimed the unconstitutionality of the Election Law by widely referring to foreign laws and case laws, such as the USA, the UK, Germany, France, Italy and Canada in order to show the fact that permissible disparity in western democratic countries were far much narrower than the Japanese one.

In the latter example, the dissenting opinion also referred to the general trend in foreign countries of abolishing the legal distinction between legitimate and "illegitimate" child and supported the appellants' claim of unconstitutionality.

Interestingly, not only dissenting opinion but also majority opinion mentioned the legal trend in foreign countries to strengthen the conclusion of unconstitutionality in the Nationality Law case (see, 3.2.1.2).

Secondly, although there is a gap between Japanese law and foreign law and probably the gap is so enormous, some judges felt obliged to emphasise that it was important to respect the differences between Japan and foreign countries (see, 3.2.3.1, 3.2.3.3 and 3.2.3.4).

It can be pointed out that dissenting opinions are more likely to refer to foreign law or case law than majority opinion and concurring opinion. The reason can be presumed that it is helpful for the dissenting opinion to point out that foreign law or case law of foreign countries which has been basis of the Japanese law would provide a different answer which the dissenting opinion supports. On the contrary, because of minimalistic attitude of the Supreme Court of Japan if the Court can derive the conclusion from the Japanese law and case law of the Supreme Court of Japan and the conclusion is compatible with the foreign law and case law, then the Court can rely on its own case law and it is not the usual approach for the Court to cite the foreign law or case law.

4. Hidden Influences

4.1. What are "Hidden Influences"?

In this section I discuss cases in which majority opinions do not cite or refer to foreign case law or foreign law in an explicit way but the reasoning or/and a test (standard) of constitutionality is so similar to an existing foreign case law that it is difficult to deny the existence of influences. In other words, the similarities are so strong that it can be classified as direct influences if the Court only added the formal citation.

In order to cover the most appropriate examples for hidden influences and depict an interesting characteristics of case law of the Supreme Court, in this section I enlarge the time period to include earlier cases which are not covered by the time

period as I explained. Examples in this section are not exhaustive.

Presently I can think of three sources of hidden influences. First, the appellants often cite or refer to foreign case law or foreign law to reinforce their argument although it is unlikely that judges adopts their argument based on foreign legal authorities.

Secondly, some judges whose backgrounds are academic tend to have more comparative legal knowledge. The good example is Judge Ito who was formerly an Anglo-American law professor of Tokyo University before he was appointed as a judge of the Supreme Court. Therefore his reasoning and even a test of constitutionality are strongly influenced by his study on the US case law (see, 4.2.4).

Lastly, it can be presumed that law clerks may prepare some comparative law materials including foreign law and case law which are relevant in a particular case in question. Even it is possible to speculate that when law clerks support a drafting process of judgements, their knowledge of foreign case law, particularly the US case law might indirectly influence on the process. It looks more relevant when the fact is taken into account that the law clerks are in the late 30s or early 40s. Many of them studied constitutional law by using textbooks written by academis who have been influenced by the US constitutional case law. The best example is a textbook written by Professor Ashibe of Tokyo University who was keen on activating the role of the Supreme Court as a guardian of the Constitution and human rights after his comparative study in the United States.[37]

It should be noted that in the 1980s the theme of judicial review became very popular among scholars and the thorough comparative study on the US case law has continued since then. Particularly aforementioned Professor Ashibe played an important role in making the judiciary become familiar with a uniformed way of adjudicating constitutional cases, by suggesting various tests (standards) of constitutionality which he learned from the US case law. The immediate influence (how his efforts were successful) was limited and the Supreme Court does not adopt the same tests of constitutionality as Professor Ashibe promoted. However, if I compare the judgments of the earlier period and the current judgments, the differences exist. The reasoning of the judgments became clearer and some constitutionality tests are recognised although the constitutional legal scholars still criticise ambiguity of the reasoning and constitutionality test. Judges are more concerned with the harmony between the consistency of judgments and the constitutional role of judges as a last resort to protect human rights (see, 3.2.1.2 and 3.2.2.6). Because of accumulation of judgements they put themselves in a situation that they are not only required to give an answer to a case in question but also required to make precedent consistent and persuasive. Although the judicial change takes more time to emerge and it is subtle in the Japanese context, it does happen in my view.[38]

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[37] Nobuyoshi Ashibe, Constitutional Law (4th ed. Iwanami, 2007) is a long seller as a constitutional law textbook in Japan.

[38] In September 2008, a judge of the Supreme Court who was born after World War II was appointed for the first time.

4.2. Some Examples

4.2.1. Pharmacies' Location Regulation (30 April 1975)[39]: Level of Scrutiny and the Footnote Four of Carolene Products Case

The case was concerned with the legal regulation on locations of pharmacies by the Pharmaceutical Affairs Act. In the beginning of the judgement, the majority opinion emphasised the difference between freedom to choose occupation and freedom of "mental" activities (freedom of conscience, religion and expression) .

> Indeed, because occupation, as previously stated, is in essence a social and, moreover, principally an economic activity, and by its nature something in which mutual social relations are great; in comparison to other constitutionally guaranteed freedoms, especially the so-called "mental" freedoms, the demand for regulation by public authority is stronger. Thus the recognition under article 22, paragraph 1 of the Constitution of freedom of occupational choice with the reservation, "to the extent that it does not interfere with the public welfare," may be considered to derive from an intent to emphasize this point in particular.[40]

The academic scholar understood the judgement in a sense that the Court admitted the supremacy of freedom of expression and therefore, when the Court examines the constitutionality of restrictions upon freedom of expression, it does so more carefully by using stricter tests. Therefore, they claimed that the Supreme Court of Japan accepted the idea of level of judicial scrutiny depending on the characters of rights as the US Supreme Court did. As I explained before, efforts of Japanese constitutional scholars introduced the idea of level of scrutiny into Japanese constitutional legal study. However, it is not clear the Supreme Court knew the footnote four of the United States v. Carolene Products Company[41] but it is possible that the Court (or young legal clerks) knew the idea of level of judicial scrutiny in the US.

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth...
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny

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[39] Supreme Court (GB), judgment of 30 April 1975, *Minshu* 29-4-572.

[40] http://www.courts.go.jp/english/judgments/text/1975.04.30-1968-Gyo-Tsu-No.120.html 〈visited 30/07/2008〉.

[41] 304 U.S.144 (1938).

under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious ... or national ... or racial minorities ...: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[42]

Ironically, the Japanese Supreme Court has never admitted a violation of the Article 21 which guarantees the freedom of expression in any cases. The level of scrutiny for freedom of expression cases which the Court adopted has been often criticised that it was not strict enough to protect freedom of expression.

4.2.2. Public Safety Ordinance (10 September 1975)[43]

The case is concerned with the group parades and demonstrations which violated the Public Safety Ordinance of Tokushima City and the Road Traffic Law. The appellants claimed that the legislation violates the Article 31 of Constitutional Law (due process) as it was not clearly written to enable them to understand.

This case showed characteristics of opinions of the Supreme Court which I clarified in section 3. Firstly, the majority opinion did not refer to nor cite any foreign case law. Secondly, one of the concurring opinions shows strong affinity to the US Supreme Court case law. The Judge Kishi referred to historical vicissitudes of the clear and present danger test of the US case law in order to show the extent of the doctrine.

> The Judicial precedents of the United States Supreme Court apply the principle of "clear and present danger" in deciding continuality [sic][44] because the purpose of regulations is to control the expressions as they are, and it is striving to decide the constitutionality of such regulations by a strict standard. The principle was originally used for deciding the constitutionality of punishing the acts such as instigation or agitation of the acts that cause a substantial harmful effect that may be constitutionally prevented by the nation. The grounds for the control can be seen in the idea that those expressions that may cause imminent danger of a substantial harmful effect can be regarded as an action causing such a harmful effect, therefore, there is no time to wait for a natural control by exchange of free expressions. The said principle has been applied widely especially since the 1930s and in deciding the control over the acts of freedom to be unconstitutional, the phrase has appeared like a cliche, however, consideration has been accumulated on the

[42] Id, footnote 4.

[43] Supreme Court (GB), judgment of 10 September 1975, *Saikou Saibansho Keiji Hanreishu* (hereinafter *Keishu*) 29-8-489.

[44] The original Japanese text is constitutionality.

scope of its application, and in 1950, it has become clarified that the principle does not apply to every case, as it does not apply to the case where the purpose of control is to prevent the critical and harmful effect caused by the action. In 1951, it was pointed out that the principle had been widely applied to cases where guaranteed interests are insignificant and are not sufficient to regard the control as constitutional. Even for the control that intends to prevent the harmful effect of expressions themselves, when the interests to be guaranteed are extremely important, the range of control can be expanded and with respect to the application of the principle, it has become evident that the consideration is required by means of weighing up the advantages and disadvantages. In 1965, it was decided that the acts of parades and gatherings are a mixture of action and expression, therefore, in order to prevent a substantial harmful effect caused by the phase of action, to punish a demonstration in the neighborhood of the courts is constitutional. In 1968, with respect to a case of a symbolic action, that is the act of burning a draft card in public, when an act of speech and non-speech are combined to one action and a sufficient national interests can be seen in controlling the phase of non-speech, it is not unconstitutional to restrict the freedom of expression that was accompanied by the restriction. Further, in the judicial precedent in 1973, which decided that prohibition of political action by public officials is constitutional, an important consideration was given to the distinction between a genuine speech and a speech with action.

It goes without saying that I do not doctrinally follow the judicial precedents in the U.S. Among the said summarized judicial precedents, there are opposing opinions which are worth listening to, however, some of the cases have a different nature of content from those in question in Japan. Nevertheless, the reason for having cited them, I think it is worthwhile paying attention to the change of application of the principle in the above judicial precedents. That is, I think it is important to consider that the change of its application was not deducted by mere logic, but as a result of induction based on experience, the emphasis is placed on the choice of rational values in the judicial procedure, and even if there was an age of expanding the application of the principle, these days, it has been consciously used as a standard for deciding the constitutionality of the control over expressions.[45]

Thirdly, the reason Judge Kishi invoked the US case law is not for admitting a violation of the Constitution, but for limiting the extent of protection of freedom of expression. The same attitude can be observed in other cases (3.2.3).

[45] http://www.courts.go.jp/english/judgments/text/1975.09.10-1973-A-.No.910.html 〈visited 30/07/2008〉

4.2.3. Separation of Government and Religion (Laïcité) (13 July 1977)[46]: the Purpose-Effect Test and the Lemon Test

The case is concerned with the constitutionality of the act of local government which presided a ceremony in a Shinto style (Jichinsai[47]) which are often performed before a construction of buildings in Japan to pray for safety. The issue is whether the ceremony is a religious activity which is prohibited for central and local governments under the Constitution (Art 20 and 89) or a social custom the people expect the local government to do so for safety of construction work.

The court showed a test to decide whether the act in question was constitutional or not.

> ··· "religious activity" should not be taken to mean all activities of the State and its organs which bring them into contact with religion, but only those which bring about contact exceeding the aforesaid reasonable limits and which have a religiously significant purpose, or the effect of which is to promote, subsidize, or, conversely, interfere with or oppose religion. The prime example of such activities is the propagation or dissemination of religion, such as religious education, which is explicitly prohibited in Article 20, Paragraph 3; but other religious activities like celebrations, rites, and ceremonies are not automatically excluded if their purpose and effects are as stated above. Thus, in determining whether a particular act constitutes proscribed religious activity, external aspects such as whether a religious figure officiates or whether the proceedings follow a religiously prescribed form should not be the only factors considered. The totality of the circumstances, including the place of the activity, whether the average person views it as a religious act, the actor's intent, purpose, and degree (if any) of religious consciousness, and the effects on the average person, should be taken into consideration to reach an objective judgment based on socially accepted ideas.[48]

The stark similarities (using the same words such as purpose and effect) between the above purpose-effect test and the Lemon test of the US Supreme Court was pointed out by Japanese scholars although the Court did not cite Lemon v Kurtzman.[49]

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither

[46] Supreme Court (GB), judgment of 13 July 1977, *Minshu* 31-4-533.
[47] A religious ceremony to pray for a god of earth not to be disturbed by the construction.
[48] http://www.courts.go.jp/english/judgments/text/1977.7.13-1971.-Gyo-Tsu-.No..69.html 〈visited 30/07/2008〉 (The underlines are added by the author).
[49] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

> advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); [403 U.S. 602, 613] finally, the statute must not foster "an excessive government entanglement with religion." *Walz*, supra, at 674.[50]

Taking into account the fact that the Court had no experiences of how to interpret the separation clause before, it can be easily imagined that the Court consulted the case law of the US Supreme Court since some clauses of the Japanese Constitution are largely modelled on the US Constitution and particularly Article 20 of the Japanese Constitution is considered to be influenced by the First Amendment of the US Constitution. The latter point was raised by the dissenting opinion of Judge Fujibayashi. After all, introduction of the principle of separation of government and religion was one of the principal policies of the occupation period. Therefore, it is difficult to say that the Court never received any influences from the US case law.

When the purpose-effect test and Lemon test are observed carefully, there are significant differences. Before analysing the differences, an important difference between the original Japanese text and the translated English text which I use in my article has to be pointed out. The latter translated the important part of the judgment in which the purpose-effect test was recognised as

> ..."religious activity" should not be taken to mean all activities of the State and its organs which bring them into contact with religion, but only those which bring about contact exceeding the aforesaid reasonable limits and which have a religiously significant purpose, or the effect of which is to promote, subsidize, or, conversely, interfere with or oppose religion.[51]

This means that if the religious activity has (a) a religiously significant purpose, or (2) the effect of which is to promote, subsidize, interfere or oppose religion, the activity is unconstitutional. However, in the original Japanese version, it is not clear whether it is necessary to satisfy (a) or (b) or (a) and (b) in order to recognise the activity as unconstitutional. Probably, according to the ordinary Japanese usage, it is more natural to interpret the Japanese original text as (a) and (b).[52] However, as I took the English text from the official website of the Supreme Court, in this article I stick with the English text on the premise that (a) or (b) is the official view.

The Lemon test requires the government to fulfil all three conditions in order to be accepted as constitutional. If any of these three conditions are violated, the government act is considered as unconstitutional. On the other hand, according to the Japanese test if the government act has a religiously significant purpose, or the effect of the act is to promote, subsidize, or, conversely, interfere with or oppose religion, the act is deemed unconstitutional. Moreover, the Japanese one does not include a third requirement of the Lemon test ("an excessive government entanglement with religion"). Therefore, the judgement was criticised that the Supreme Court of Japan

[50] Id. The underlines are added by the author.
[51] The underline is added by the author.
[52] The requirement as (a) and (b) makes the extent of unconstitutional religious activity narrower.

softened the Lemon test in order to allow the government to do questionable religious activities.

The advantage of not officially citing the foreign case law may be to protect the Court from the criticism.[53] After all, the Court did not cite the US case law. Therefore, criticism upon the Lemon test is not directly applicable to the Japanese Court. However, if this is an academic work, it would be called as plagiarism or at least misquotation.

Probably the problem of the hidden influence (not disclosing the source) is that there is no clear explanation why the purpose-effect test can draw the line between the prohibited religious act and permissible religious act. On the contrary, the US Supreme Court established the test by consideration of the cumulative criteria developed by the Court over many years. The legitimacy and rationality of the US test is supported by facts and experiences.

The purpose-effect test was so influential that courts never failed to use the test in cases concerning the principle of separation of government and religion (see, 3.2.3.2) since the 1977 judgement. However, some scholars point out that the purpose-effect test is not always applicable and adequate for cases concerning the separation principle. If the origin of Japanese purpose-effect test is the US case law, then it is more productive to disclose the origin and examine to what extent the US case law is relevant, taking into account the differences of facts and backgrounds. A thorough and exhaustive comparison between the Japanese and US cases (including similarities and differences of cultural and historical backgrounds) helps clarifying a possible extent of the purpose-effect test. If the origin of the test is not the US case law, it is important to analyse all the cases concerning separation of government and religion in order to re-examine the extent of the purpose-effect test.

4.2.4. Prohibition on Leaflet Distribution (18 December 1984)[54]: Public Forum Doctrine

The case concerned with the freedom of expression as distribution of political leaflet at a railway station run by a private railway company. The appellants claimed that criminalising their act of distribution of leaflet was unconstitutional. The majority opinion simply denied the appellants' claim. The majority admitted that the Article 21 did not guarantee absolute freedom of expression and permitted a necessary and reasonable restraint on freedom of expression. It did not show any specific test to judge constitutionality nor adopt a stricter scrutiny. This is the exact example that the Court has not introduce a stricter scrutiny and a stricter test for freedom of expression (see, 4.2.1).[55]

The interesting characteristic of this case is the concurring opinion of Judge Ito who was an Anglo-American law professor before he joined the Court (see, 4.1). In

[53] In the United States, using of foreign precedents has been controversial and the media criticised some Justices of the Supreme Court who have cited foreign law. See, Reed, supra note 1, at 253. Cf., Ginsburg, "A Decent Respect to the Opinions of [Human]kind: the Value of a Comparative Perspective in Constitutional Adjudication" (2005) 64 *CLJ* 575.

[54] Supreme Court (Third Bench), judgment of 18 December 1984, *Keishu* 38-12-3026.

[55] It should be reminded that the judgement was given not by Grand Bench but the Third Bench.

his opinion, he introduced a concept of "public forum" where freedom of expression has to be guaranteed as carefully as possible in order to secure a place (public forum) where people can communicate their opinion to other people in an effective way. The English words "public forum" were not translated but written as "puburikku fouramu"[56] (パブリック・フォーラム). Therefore it is very clear that the concept is imported from outside, i.e., the US case law. However, he did not cite any of the US case law concerning the public forum doctrine. It is interesting to consider why he mentioned the public forum doctrine because that he joined the majority opinion and stated that the place in question did not have strong nature of public forum.

4.2.5. Use of City Hall (7 March 1995)[57]: Clear and Present Danger Test

The case is concerned with refusal of the permit to use of a city hall for political meeting (a political campaign of the leftist group against a planning for a new airport). The organiser of the meeting claimed that the refusal by the city council violated freedom of expression and association (Article 21 of the Constitution) and the refusal was censorship which the Constitution prohibited (Article 21, Paragraph 2). The Court admitted the refusal as constitutional (one concurring opinion).

I choose this as the last example because it includes points I raised. Moreover, it can show a typical situation of case law building by the Supreme Court of Japan. First, the principal issue of the case is freedom of expression to which the Court has never admitted the violation of the Constitution and it did not in this case.

Secondly, the similarities of the wording of the scrutiny test between the Japanese and the US case law is found. The Court required the city council to foresee a clear and present danger in order to refuse the permit of city hall. The Schenk v. United States established the test in 1919 but there is no citation of it by the Japanese side.

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the United States Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.[58]

Thirdly, because of the accumulation of Japanese case law as its own, it seems that the Court becomes less likely to mention the case law of foreign countries.

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[56] In Japan foreign words are often written or spoken as they sound in Katakana. Katakana (one of three characters of Japanese) is used to make the people notice that they are foreign words. The advantage of this usage is that they don't need to translate them. The disadvantage is that they accept the words without seriously thinking what they mean. Moreover, it is very likely that how to read the words are greatly influenced by Japanese. E.g., public forum is pronounced as pu-bu-ri-kku fo-u-ra-mu in Katakana.

[57] Supreme Court (Third Bench), judgment of 7 March 1995, *Minshu* 49-3-687.

[58] *Schenck v. United States*, 249 U.S. 47 (1919).

Instead, the Court cites its own case law. However, there are some problems from a perspective of case law building. For example, the Court referred to the judgment of 23 December 1953 which was not ratio decidendi but obiter dictum on the matter in question.[59] The Court referred to the judgement of 11 June 1986[60] of which facts and context are different from the case in question. Similar problems are widely recognised in other cases. The concept and principle of the precedent is relatively ambiguous and loose.

5. Interim Conclusions and Implications

In my view, the influence of foreign law or case law at the Supreme Court seems relatively bigger than scholars have empirically thought if the hidden influences are taken into account. Majority opinions of the Court have received hidden influences from foreign case law, particularly the case law of the US Supreme Court. One of the judges of the Supreme Court of Japan clearly stated that it is not acceptable to deny the importance of foreign experiences although it was in his dissenting opinion.

The problems are, however, foreign case law is rather randomly and arbitrarily used when it is convenient for judges to use it in order to reinforce their reasoning or argument. Besides since the judges do not show citation of foreign case law when they mention or indirectly utilise it, it is difficult to find a case referred. After all the method for citation of precedents of Japanese case law itself is problematic as it does not show the number of the page or paragraph the Court cites. This is a great difference between the Japanese jurisdiction and common law jurisdictions.

I conclude the article by an attempt to answer further constitutional and international legal questions which I raised in the beginning. Firstly, as to the existence of a trans-judicial dialogue between courts, the word "trans-judicial dialogue" needs to be clarified in order to have a productive and substantial discussion. If a "trans-judicial dialogue" means a situation where a court of the country A refers to or cites the country B's case law and vice versa, then Japanese situation is not a dialogue but one-sided import. Justice Ginsburg once wrote:

> If US experience and decisions can be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so we can learn from others now engaged in measuring ordinary laws and executive action against charters securing basic rights.[61]

Since her view is controversial in the context of the United States, the possibility of an equal dialogue remains to be seen. On the other hand, the growing interest in comparative law in the States and Europe supports to develop a dialogue in a positive way. In Japanese context more attention should be given to the necessity

[59] The judgement of 23 December 1953 dismissed the appeal because it did not have a legal interest to be protected. Therefore what the judgement examined as the issue of constitutionality of the refusal of the permit as "reference" cannot be precedent.

[60] It is concerned with the injunction to prevent the defamation against an electoral candidate by a journalist.

[61] Ginsburg, supra note 53, 576.

of legitimacy and methodology of using foreign precedents in order to avoid misuse of foreign precedents and achieve a consistent and productive use of foreign precedents. I also would like to emphasise the possibility that the existence of the European Court of Human Rights greatly promote the "transjudicial dialogue" by the accumulation of the case law of the European Court of Human Rights in the European context. The case law of the European Court of Human Rights can be recognised as semi-constitutional cases since many of the cases were dealt by either the constitutional courts or supreme courts of a Contracting State before they went to Strasbourg and the European Court takes into account the domestic judgments.

Secondly, as to the convergence of the common law and civil law traditions, there is a convergence of the common law and civil law tradition in Japan in an unself-conscious way.

Lastly, it can be safely said that the Supreme Court of Japan accepted universalism of human rights as an ideal or a principle. However, it is a crucial matter that how human rights are implemented in the Japanese context. Particularly from a perspective of judicial implementation of human rights, there are many practical and theoretical issues to be tackled with. I suppose that foreign precedent is a source of knowledge and experiences to explore how the general and abstract wording of human rights clauses can be interpreted.